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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ROBERT PILCHMAN,
Plaintiff,

- against -

DEPARTMENT OF DEFENSE,
Defendant.

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MEMORANDUM AND ORDER
97 CV 3010 (NG)

GERSHON, United States District Judge:

Pro se plaintiff, Robert Pilchman, brings this action against defendant Department of Defense, alleging that he suffered discrimination and was rejected from enlistment in the Navy's nuclear propulsion office candidate program ("NUCPOC") because he is an Orthodox Jew. He seeks damages and injunctive relief. Defendant moves to dismiss pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure for failure to state a claim and for lack of subject matter jurisdiction.

BACKGROUND

The complaint alleges the following: On August 16 1996, plaintiff Robert Pilchman, a 27 year-old Orthodox Jew residing in Brooklyn, New York, spoke to Lieutenant William Haas regarding opportunities in the Navy's NUCPOC. Plaintiff informed Haas that he had graduated from Brooklyn College majoring in math. On August 19, 1996, after plaintiff delivered his academic transcripts, Lieutenant Evan Dash mentioned his own affiliation with reform Judaism and informed plaintiff, who was wearing a skull cap and had a beard at the time, that he could not observe the Sabbath if he was accepted into the program. Dash also told plaintiff about other

programs in the Navy in the event he was not accepted into NUCPOC. Plaintiff responded that he would be willing to work on the Sabbath, but questioned why Dash, who said he was not handling applications for NUCPOC, told him this. Plaintiff later clarified that he had not requested any special accommodations for his religion at all.

On August 22, 1996, Haas told plaintiff that his application was being processed and to expect a response in two weeks. Later, on September 3, 1996, plaintiff called Haas, but Dash instead answered the phone and informed plaintiff that he would make the decision on plaintiff's application. Moreover, Dash told plaintiff that he was unsuitable for any program in Navy, and that he did not want plaintiff as his "wingman." In response, plaintiff told Dash that he would contact his representatives about discrimination and asked to speak with Dash's commanding officer. Dash, however, declined to put plaintiff in contact with his commanding officer. Later that day, Dash informed plaintiff that his application had been stopped and defended his actions as being "by the book." Shortly thereafter, plaintiff received a letter from S.P. Hernandez of the Navy Recruiting Office, informing plaintiff that he was not "selected for further processing."

Based on his belief that Haas had encouraged his application, but that Dash, while asking for more information, found pretexts to deny it, plaintiff alleged discrimination. The Navy conducted an investigation, which resulted in a December 18, 1996 letter addressed to Senator Alfonse D'Amato from Captain F.E. Beatty, U.S. Navy, that concluded that plaintiff had not been afforded due process in his application for a Navy commission. The letter promised that his application would be "fairly and expeditiously" reviewed. A December 30, 1996 letter, addressed to Senator Daniel Patrick Moynihan, also concluded that the "investigation has been completed and reviewed."

Later, on the suggestion of Commander Wurzel, the Commander of Navy Recruiting for the New York District, plaintiff spoke with Lt. Dan Gawitt, who discouraged plaintiff from applying to NUCPOC because of his age— at the time, he was 27 years old— and because plaintiff's college physics courses had not been calculus-based. Plaintiff again believed these reasons to be pretexts for discrimination, noting that he had not been told about these concerns when he previously applied for NUCPOC. Plaintiff was eventually informed by Haas that his application for NUCPOC had been resubmitted, but he received conflicting information regarding the manner and timing of its submission.

On January 22, 1997, plaintiff underwent a physical examination by Dr. Bernard Weiss at Fort Hamilton. Plaintiff found this meeting "suspicious" because he "just had his urine tested . . . and took care of clerical business" and was taken out of turn as he waited to give blood samples. Dr. Weiss requested that plaintiff obtain records relating to 1985 counseling sessions, a 1990 removal of a cyst, and a 1975 treatment for dehydration. After the examination, Dr. Weiss informed plaintiff that the physical would not prevent plaintiff from being accepted. Plaintiff was also told by several persons who examined him that various conditions relating to his sight, curved spine and psoriasis would not disqualify him from service. Chief Doctor Bruce J. Nitsberg, however, permanently disqualified plaintiff because of his psoriasis and excessive refraction. Again, plaintiff believed that the physical disqualification was pretextual and that certain military personnel influenced Dr. Nitsberg's evaluation. Commander Wurzel suggested to plaintiff that his physical could be redone, but another physical was never scheduled. In March 1997, two letters from the Navy suggested that plaintiff might be "required to provide additional documentation concerning [his] psychological counseling."

Plaintiff eventually was informed that his application for NUCPOC was rejected because his college physics courses were not calculus-based and because he is too old. Plaintiff attached to the complaint several letters that he received from military officials in response to his inquiries about his application for NUCPOC. The April 24, 1997 letter from the Office of the Naval Inspector General concluded that "no further action by the Naval Inspector General is considered warranted." And the May 1, 1997 letter from the Office of the Inspector General of the Army concluded that plaintiff had been "assisted in every possible way in resolving those matters of concern to you and . . . under the circumstances, it has been determined that your case was given a thorough and impartial review."

DISCUSSION

A *pro se* plaintiff's complaint is held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). "[H]owever inartfully pleaded," a *pro se* complaint can only be dismissed for failure to state a claim if it appears "'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 520-21 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). For purposes of a motion to dismiss, the allegations of the complaint must be taken at face value. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972). Here, the complaint does not clearly identify the legal bases for the claims alleged against the Department of Defense; however, the allegations of the complaint can be read to assert the following three claims: (1) a constitutional tort claim for damages under the Federal Tort Claims Act; (2) a claim for employment discrimination on the basis of religion under Title VII; (3) a *Bivens* claim for

damages for violations of his constitutional rights; and (4) a claim for injunctive relief based on the unconstitutional actions of federal officials.

Plaintiff alleges that he was rejected for a position in NUCPOC because he is an Orthodox Jew. Plaintiff cannot pursue a claim in tort for money damages under the Federal Tort Claims Act ("FTCA") because he did not file an administrative claim with the Department of Defense in a timely fashion. The FTCA "requires that a claimant against the federal government file an administrative claim with the appropriate agency prior to institution of suit." *Keene Corp. v. United States*, 700 F.2d 836, 840 (2d Cir. 1983). Section 2675(a) of the FTCA provides, in relevant part:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. § 2675(a). The requirement that a notice of claim be filed is jurisdictional and cannot be waived. *Keene Corp. v. United States*, 700 F.2d at 841.

Here, plaintiff does not allege that he filed any administrative claim with the Department of Defense before instituting the present suit or that such claim was finally denied. Instead, plaintiff belatedly submitted a November 3, 1997 letter to defendant, which purports to inform defendant of this claim. However, since plaintiff failed to file an administrative claim before the institution of this action on May 27, 1997, he has failed to satisfy the prerequisite for a claim under the FTCA. Any claim in tort for money damages that plaintiff might have had therefore

must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See, e.g., McNeil v. United States*, 508 U.S. 106, 113 (1993).

Nor can he rely on Title VII of the Civil Rights Act of 1964, which forbids employment discrimination based on religion, 42 U.S.C. § 2000e-2, *et. seq.*, because Title VII does not apply to uniformed positions of the military, nor even to civilian applicants for uniformed positions. *Spain v. Ball*, 928 F.2d 61, 62 (2d Cir. 1994); *Roper v. Department of the Army*, 832 F.2d 247, 248 (2d Cir. 1987). Since it is undisputed that the position in NUCPOC, for which plaintiff submitted an application, is a uniformed military position, plaintiff cannot state a Title VII claim for employment discrimination based on his religion.

In his complaint, plaintiff also invokes the "jurisdiction of this court . . . pursuant to *Bivens* type cases." *See Bivens v. Six Unknown Fed. Narcotics Agents*, 402 U.S. 388 (1971). In *Bivens*, the Supreme Court implied a cause of action for damages against federal agents alleged to have violated the plaintiff's constitutional rights. A *Bivens* claim for an alleged deprivation of constitutional rights, however, cannot be brought against a federal agency; it can only be brought against individual federal agents. *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 478 (1994) ("An extension of *Bivens* to agencies of the Federal Government is not supported by the logic of *Bivens* itself."). Since the Department of Defense is indisputably a federal agency, plaintiff fails to state a *Bivens* claim for damages against it.

Finally, however, plaintiff seeks injunctive relief against the Department of Defense on the basis of the allegedly unconstitutional actions of certain federal officials. Defendant has not addressed the viability of plaintiff's claim for such relief.

CONCLUSION

Defendant's motion to dismiss is hereby granted to the extent that the claims for damages against the Department of Defense are denied. If defendant wishes to move against the claim for injunctive relief, it should do so within 20 days from the date of this order.

SO ORDERED.

NINA GERSHON
United States District Judge

Dated: Brooklyn, New York
July 17, 1998